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January 4, 2011

City Council
City of Benicia
250 East L Street
Benicia California 94510

**Re: Comments on Agenda Item: IX.A
REPORT FROM THE ARSENAL SUBCOMMITTEE AND
RECOMMENDATION FOR AWARD OF AN AGREEMENT
FOR CONSULTING SERVICES FOR THE BENICIA ARSENAL
PROJECT TO ENVIRONMENTAL RISK SERVICES ("ERS").
(City Attorney)**

Dear Councilmembers:

Please accept these comments submitted on behalf of my client, Amports Inc., an owner of some of the land that is the subject of the Draft Imminent and Substantial Endangerment Order that has been circulated by the Department of Toxic Substances Control (DTSC) related to what has now been dubbed by the City "the Benicia Arsenal Project."

Regarding the proposed Consulting Contract that is the subject of this agenda item, please recall that I have commented several times, at hearing and in writing, about aspects of the proposed agreement that we have found to be problematic and, in some cases, disturbing.

I appreciate that effort has gone into revising the document to address some of its deficiencies and that attention has been given to communicating with the potentially affected landowners about the City's initial intentions regarding the consulting contract, as well as the overall handling of the Benicia Arsenal Project.

Nonetheless, serious issues remain unaddressed (or under-addressed) in the current version of the contract. Additionally, certain items that we were told would be included in the document have not been. Finally and probably most significantly, promises made by the City Attorney, Mr. O'Brien, and Mayor Patterson at the December 22, 2010 meeting with the landowners are not reflected in the current iteration of the consulting contract. Instead, as will be detailed below, the document reflects a tool that allows for, if not encourages, a result that is the opposite of what has been promised.

As such, we ask that the Council change the terms of the contract as set out below.

1. THE CONSULTING CONTRACT AS WELL AS THE CORRESPONDING RESOLUTION MUST REFLECT THE CITY'S STATED INTENTION TO NOT SUE THE LANDOWNERS

Since the beginning of discussion regarding the consulting contract, I, and others, have noted that the contract incentivized "going after the landowners." This is because (1) the contract called for the Consultant to get paid only through monies identified and captured by the Consultant (acting as the City's agent); (2) it specifically allowed for the Consultant to seek such monies from landowners; (3) it calls for the Consultant to seek such funding from settlement resolution or satisfaction of any claims related to the contamination investigation, and/or remediation of the Arsenal...";¹ and (4) *the contract put no boundaries on what the Consultant could or should collect on the City's behalf.*

Taken together with the clauses that gives the Consultant *exclusive* right to negotiate for funds on behalf of the City and *exclusive* right to the funds collected, the document gives the Consultant tremendous power to seek compensation from sources that have great potential to damage the affected landowners, and, as has been discussed, ultimately the City as a whole. Unfortunately, the latest iteration of the document does not change any of these conditions.

Here, it is worth note that certain City officials seemed to have recognized this problem in the document. I was surprised to see no changes were made to the document to reflect that recognition.

Specifically, at the City's recent informational meeting for Arsenal landowners (December 22, 2010), the City Attorney, the Mayor, and Mr. O'Brien (the proposed consultant) answered several questions about the proposed contract and the project.² When asked about the possibility that the City might sue the landowners in order to trigger insurance coverage only available if litigation is at issue, all three stated emphatically that the City will not sue the landowners. Versions of this promise were repeated during other parts of the discussion.³ I think many in the audience took comfort in this revelation. Certainly, my client and other landowners were happy to hear that this is the City's clear intention.

The problem remains, however, that neither the proposed contract, nor the resolution adopting it, is reflective of this commitment. Instead, as detailed above, they allow, if not encourage, precisely the opposite to occur. If it truly is the City's intention to not sue the landowners or otherwise make claims against them, as officials have clearly

¹ §3[b].

² The meeting was also attended by Councilmember Ioakimedes, and (briefly) by Councilmember Campbell.

³ My understanding was that this intention would extend to not filing claims against property owners because of the potential deterrent to the landowner's insurance coverage and related costs. (For further discussion, please see email correspondence from Craig Anderson included in the Council packet.)

articulated, that intention must be reflected in the Consulting Contract by placing appropriate restrictions on the Consultant's activities.

Attached please find additional and substitute language intended to better reflect the City's stated intentions and to protect the landowners from any potential overzealousness on the part of the Consultant. We ask that you adopt this alternative language if you determine to move forward with the consulting contract in its current form. (I have also included edits regarding the escrow account which I hope are helpful in addressing concerns about the Consultant's authority over the fund.)

Additionally, to further allay the landowners concerns, I ask that the resolution include a resolve indicating that the Consultant is not retained for the purpose of pursuing claims or litigation against the Arsenal Landowners.

Finally I note that at the last City Council meeting in response to Councilmember Campbell's concerns an indication was give that a rate schedule was being worked on for inclusion in tonight's discussion. Please note that the rate schedule was not included in the Council Packet.

Thank you for the opportunity to comment. I hope our efforts are helpful in moving a cooperative process forward.

Respectfully submitted,

Dana Dean

CC: Client

PROPOSED ADDITIONAL LANGUAGE - RECITALS

WHEREAS, CITY has determined it is necessary and desirable to secure certain services for consulting, legal and remediation regarding the Arsenal Cleanup Project. CITY solicited proposals from various firms to provide assistance for the potential review and remediation of the former Benicia Arsenal or parts thereof. The scope of work for said services (hereinafter "Project") is attached hereto as Exhibit "A" and is hereby incorporated by reference; and

WHEREAS, CONSULTANT is specially trained, experienced and competent to perform the services required by this agreement; and

WHEREAS, it would be beneficial to CITY if an amicable and cooperative approach to resolution of the Project was achieved with other property owners; and

WHEREAS, the City desires to protect the economic viability of all property owners in the Arsenal, including the Benicia Business Park; and

WHEREAS, the City has committed to not bringing suit or insurance claims against all property owners in the Arsenal, including the Benicia Business Park; and

WHEREAS, smaller property owners in the Arsenal, including the Benicia Business Park, do not have the resources for CONSULTANT's services if the property owners were acting alone; and

WHEREAS, CONSULTANT and CITY desire to allow CONSULTANT to provide services to property owners who would like to use CONSULTANT's services to the extent that it does not create a conflict of interest. The parties contemplate that services to other property owners may be provided either under separate contract with the property owners or, for work requiring minimal time or effort, as part of the services under this Agreement; and...

PROPOSED ALTERNATIVE LANGUAGE – SECTION 2 (a)

(a) Services to be Furnished. Subject to such policy direction and approvals as CITY through the City Attorney may determine from time to time, CONSULTANT shall perform the services set forth in the Scope of Work and the incorporated Consultant's proposal and the Request for Qualifications labeled Exhibit A, which is attached hereto and incorporated herein by reference. In the event of a conflict between these documents, text of this Agreement shall prevail over the Exhibit. It is anticipated by the parties that the scope of services will be conducted in at least three phases, including an initial due diligence phase to determine whether

any funding sources are available to complete remediation. Funding sources are money received by CITY from the US Treasury, State of California, insurance companies, and grants, for the investigation and remediation of the Benicia Arsenal, services related to that investigation and cleanup, or from settlement, resolution, or satisfaction of any claims related to the contamination, investigation and/or remediation of the Benicia Arsenal (hereafter, “Remediation Funds”). Upon receipt of adequate Remediation Funds in the escrow account, subsequent phases will include the second phase of site investigation, risk assessment, liability allocation, and the third phase of design and implementation of remediation actions. If no funding is identified to CITY’s satisfaction within eighteen months of the date of this Agreement or if insufficient funds are received to do work, the Agreement may be terminated at CITY’s discretion.

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PROPOSED ALTERNATIVE LANGUAGE - SECTION 3

3. COMPENSATION.

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(a) Contingency Agreement. This is a contingency fee agreement. Other than through the escrow process described herein and the \$10,000 in out-of-pocket expenses set forth in Section 3(b) below, CITY shall pay no compensation from the City’s general fund for the services to be provided by this Agreement. The compensation paid to CONSULTANT shall be from money received by CITY from the US Treasury, State of California, insurance companies, and grants, for the investigation and remediation of the Benicia Arsenal, services related to that investigation and cleanup, or from settlement, resolution, or satisfaction of any claims related to the contamination, investigation and/or remediation of the Benicia Arsenal (hereafter, “Remediation Funds”). except that, CONSULTANT shall not be entitled to compensation from monies received by the City from Arsenal landowners. CONSULTANT shall have the exclusive right to act as the City’s agent to negotiate for Remediation Funds on behalf of CITY, except that the Consultant shall have no authority to seek funds from landowners, or landowners’ insurance.

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All Remediation Funds shall be deposited into an escrow account. CONSULTANT shall be paid exclusively from that escrow account in accordance with escrow instructions to be agreed on by CITY and CONSULTANT. The escrow account shall be held and managed by CITY. Any funds retained in the account after payment of CONSULTANT’S invoices shall belong to the City.

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(b) \$10,000 for out of pocket expenses. CONSULTANT shall be reimbursed by CITY for out of pocket expenses incurred in the prosecution of this Project. The amount of out of pocket expenses shall not exceed \$10,000 to be reimbursed from the City’s general fund. An invoice and backup documentation shall be provided to CITY for the expenses. If

Remediation

Funds become available, whether through insurance or other means, and the costs and expenses associated with CONSULTANT’s services have been paid as set forth in Section 3(a) of this Agreement, then the \$10,000 shall be reimbursed to CITY.

(c) CONSULTANT shall have the right to timely payments from the escrow account

Provided that fair compensation for interim payments shall not exceed the rates on the rate schedule in effect when the work was performed, from the effective date of this Agreement. A current rate schedule is attached hereto as Exhibit B. Only funds deposited into the escrow account in excess of the estimated cost to investigate, remediate and close the environmental liabilities will be used to reimburse the CONSULTANT, for services rendered pursuant to the terms of this agreement. Fair compensation for interim payments shall not exceed the rates on the rate schedule in effect, when the work was performed; however, from time to time CITY and CONSULTANT may modify this agreement by the adoption of a new rate schedule. Any such adoption must be made in writing and approved by the City Council prior to taking effect.

CITY shall have the right to confirm that CONSULTANT has performed work consistent with the Scope of Work prior to the release of any funds to CONSULTANT. CONSULTANT shall submit monthly reports documenting its time and materials expended for the services performed under this Agreement during the preceding period. Invoices or reports must be submitted in duplicate and must indicate the hours actually worked by each classification and employee name, as well as all other directly related costs by line item. Fair compensation shall not exceed the rates in effect when the work for which compensation is sought was performed.

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